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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY THOMAS WOLFINGTON JR.,

Defendant and Appellant.

C074708

(Super. Ct. No. CRF113990)

A jury found defendant Billy Thomas Wolfington Jr. guilty of second degree murder (Pen Code, § 187, subd. (a)—count one) and active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)—count two).¹ The jury also found true that defendant personally used a deadly or dangerous weapon in the commission of these felonies. (§ 12022, subd. (b)(1).) The jury found defendant not guilty of first degree

¹ Undesignated statutory references are to the Penal Code.

murder and found not true that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).) In a bifurcated proceeding, the trial court found true that defendant was convicted in 2005 of violating section 186.22, subdivision (a) (§ 667, subds. (a)(1), (c), & (e)(1)), and had three times previously served a prison term (§ 667.5, subd. (b)). The court granted defendant's motion for a new trial as to count two only, which amounted to an acquittal on that count. The court denied defendant's motion to strike or set aside the prior strike conviction.

The trial court sentenced defendant to a total term of 30 years to life plus 8 years in prison: 15 years to life for the murder conviction, doubled due to his prior strike (§ 667, subds. (c), (e)(1)); one year for the section 12022, subdivision (b)(1) enhancement; five years for the section 667, subdivision (a)(1) enhancement; and one year for each section 667.5, subdivision (b) enhancement. The court stayed one of the prior prison term enhancements.

On appeal, defendant raises two impermissible collateral attacks on his earlier conviction for violating section 186.22, subdivision (a). As to his current conviction for murder, he asserts: (1) the trial court erred in excluding evidence that a knife had been provided to the prosecution by the victim's brother, and refusing to grant a motion for new trial on this basis; (2) the trial court abused its discretion in denying defendant's motion for a new trial based on newly discovered evidence; and (3) he is entitled to 729 days of custody credits, and not the 727 reflected in the abstract of judgment and minute orders.

Of the contentions raised in the initial briefing, only the issue relating to custody credit has merit. The parties also submitted supplemental briefing on the applicability of recent amendments to sections 667 and 1385, permitting the trial court to exercise its discretion under section 1385 to strike or dismiss five-year prior serious felony

enhancements under section 667, subdivision (a)(1). We will remand for resentencing, but otherwise affirm the judgment. At resentencing, the minutes and abstract of judgment should reflect the custody credits awarded orally.²

I. BACKGROUND

A. *Murder of Bobby*

On September 2, 2011, C.G. and T.B. were staying next door to each other at a motel. T.B. had a party in her room, and left her door open. Co-defendant and C.G. were in C.G.'s room playing dice. Defendant joined them.

At some point, defendant and co-defendant went to the party. Later, C.G., defendant and co-defendant tried to get everyone to leave the party because T.B. wanted everyone out of her room. Bobby, one of the people at the party, argued against the request. He asked why T.B. did not ask him to leave herself.

Defendant said, "Well, looks like I'm going back to the pen," and pulled a butterfly knife out of his waistband. Co-defendant and then defendant fought Bobby. As defendant punched Bobby, he also stabbed him. One of the witnesses yelled, "call 911, they're killing him." Witnesses saw neither Bobby nor co-defendant with a knife.

Defendant and co-defendant ran out toward the railroad tracks. Bobby stumbled after them and collapsed in the parking lot.

Police officers who responded to the scene located defendant and co-defendant in nearby bushes. Co-defendant had an injury to his arm. He also had a folded knife in his pocket. The crime scene investigator did not find any knives in the motel room or in Bobby's clothing.

A medical examiner testified that Bobby was stabbed at least 13 times. Bobby died as a result of these stab wounds. One wound was four-and-a-half inches deep: a

² The panel as presently constituted was assigned this matter in June 2018.

knife had pierced through Bobby's abdominal wall, liver, diaphragm and all the way to his heart. The medical examiner testified it was unlikely that the knife with a three-and-a-half-inch blade that was found on co-defendant killed Bobby. He estimated that the knife that killed Bobby would have had a six-inch blade. Bobby had no defensive wounds.

B. Defendant's Testimony

Defendant testified that after he told people to leave because T.B. did not want them in her room, Bobby said he wasn't going anywhere. Bobby argued with C.G. Defendant again explained that T.B. did not want Bobby there, and Bobby said, "if I leave, I'm coming right back." Defendant asked Bobby for clarification. Bobby said, "I'll pop you, cracker." Defendant interpreted this as a threat to shoot him. Defendant replied that he would not let Bobby out of the room talking like that. Bobby reached into his pocket with his left hand and then put his hand behind his body. Bobby struck at co-defendant. At that point, defendant saw that Bobby had a knife in his left hand. Defendant later noticed a sizeable cut on the arm co-defendant had put up to block Bobby's first strike. Bobby and co-defendant fought, and then Bobby turned to defendant and charged him. Defendant opened up his butterfly knife and stabbed Bobby in the stomach. Bobby kept coming at defendant, and defendant kept punching with his right hand and stabbing with his left until Bobby stopped. Defendant said he dropped his knife before he left the room.

II. DISCUSSION

A. 2005 Conviction

1. Substantial Evidence Claim

Defendant contends the evidence was insufficient to support the court's finding that he had a 2005 conviction for violating section 186.22, subdivision (a), because there was no credible evidence that he committed the offense with another gang member. We agree with the People that this is an impermissible collateral attack on the prior

conviction. Collateral attacks on prior convictions used for sentencing enhancement are permissible in current proceedings in two circumstances where a determination of an alleged constitutional violation may be made without disrupting efficient judicial administration: (1) denial of counsel or (2) failure to secure a proper waiver of the defendant's *Boykin-Tahl* rights.³ (See generally *People v. Allen* (1999) 21 Cal.4th 424.) Otherwise, the validity of a prior conviction is typically litigated in a separate proceeding, such as habeas corpus. (*Id.* at p. 429.) Defendant does not appear to dispute any of this. He contends that "though a violation of section 186.22, subdivision (a) was a strike in 2005 when [he] admitted it, the subsequent decision by the California Supreme Court in *People v. Rodriguez* (2012) 55 Cal.4th 1125 narrowed the definition of when a violation of that statute constitutes a strike." To the contrary, any violation of section 186.22, subdivision (a) is a strike offense. (*People v. Briceno* (2004) 34 Cal.4th 451, 458.) The issue in *People v. Rodriguez* was when section 186.22, subdivision (a), itself is violated. The statute provides that "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by *members* of that gang, shall be punished" (§ 186.22, subd. (a), italics added.) *People v. Rodriguez* interpreted this plain language to mean that a gang member does not violate section 186.22, subdivision (a), if he commits a felony but acts alone. (*People v. Rodriguez, supra*, pp. 1131-1132.) Whether or not defendant pled guilty to an offense he was not guilty of is not properly before us.

2. *Improper Advisement Claim*

Defendant also argues the trial court should have stricken his 2005 conviction because he was improperly advised by counsel and the court of the consequences of his

³ *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

plea. He concedes on reply that to the extent he asserts an ineffective assistance of counsel claim, it cannot be brought in this appeal. (See *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 966 [“[A] defendant whose sentence for a noncapital offense is subject to enhancement because of a prior conviction may not employ the current prosecution as a forum for challenging the validity of the prior conviction based upon alleged ineffective assistance of counsel in the prior proceeding”].) He cites no authority holding that his claim that he was not properly advised by the court of the consequences of his plea in a prior proceeding is cognizable generally or in this direct appeal. (See *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457 [defendant need not be advised of possible future use of a current conviction].) At a minimum, we again conclude defendant cannot raise this challenge in this proceeding.

We turn now to the arguments defendant raises that may be brought in this proceeding.

B. Evidence of Unidentified Knife

Defendant asserts the trial court erred in excluding evidence that a knife had been provided to the prosecution by Bobby’s brother, and refusing to grant a motion for new trial on this basis. We find no abuse of the trial court’s discretion.

The prosecutor explained that, during a conversation with Bobby’s family, he stated that it would have been nice if the prosecution had found a knife. Bobby’s brother replied, “I think I might have gotten that knife.” Bobby’s brother subsequently told an investigator that, two weeks after Bobby’s murder, the brother was standing on a street corner when a male he did not know the name of walked up and handed him a knife without saying a word. According to the investigator, Bobby’s brother was under the impression “that this could be the knife that stabbed his brother. [¶] It is a boot knife with an inch-and-a-half long blade, so it is physically impossible for that to have been the murder weapon or something that stabbed his brother.”

The trial court excluded the evidence: “Certainly having evidence of a knife that was used in the altercation would itself be relevant, but to conclude that this is a knife used in the altercation is nothing other than sheer speculation. So even if relevant, I would exclude it under [Evidence Code section] 352. That was my thought process throughout these proceedings.”⁴ The court later denied a motion for new trial based on this ruling, in which it reiterated the reasons for its ruling.

“ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness . . . , having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The trial court may not admit irrelevant evidence, but it has broad discretion in determining whether evidence is relevant. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) It also has discretion to exclude even relevant evidence under Evidence Code section 352 “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “A trial court’s exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) We also review a trial court’s determination on a motion for new trial for abuse of discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

⁴ Previously, the trial court had indicated that, unless defense counsel could present some evidence other than that the knife was turned over by a member of Bobby’s family to suggest it had ever been in his possession, “I would find that it is irrelevant. And if relevant, then I would certainly find that it is—has a tendency to confuse or mislead the jury. So I would exclude it under [Evidence Code] section 352.”

As the People note, defendant's assertion that the knife was given to Bobby's brother "by someone who represented that it was involved in the stabbing" is not supported by any citation to the record. Moreover, the evidence before the trial court gave no indication that the knife had ever belonged to Bobby at all. Indeed, his brother surmised the knife was the murder weapon. It is undisputed at this point that this knife was not the murder weapon. The defense's theory was that the knife was possessed by Bobby during the murder. As the trial court correctly noted, a knife that had been possessed by Bobby during his murder certainly would have been relevant, but it was sheer speculation to conclude that this was such a knife. "[A]nd evidence which produces only *speculative* inferences is *irrelevant* evidence.'" (*People v. Babbitt, supra*, 45 Cal.3d at p. 682.) Under these circumstances, we cannot conclude that the trial court abused its discretion in concluding that whatever probative value the evidence had was outweighed by other considerations under Evidence Code section 352. "[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion." (*People v. Babbitt, supra*, p. 684.) Accordingly, the trial court also did not abuse its discretion in denying defendant's motion for a new trial on this basis.

To the extent that defendant contends the trial court's evidentiary ruling violated his right to present a defense, to due process, and to a fair trial, this claim also fails. (*People v. Babbitt, supra*, 45 Cal.3d at pp. 684-685.) "[B]ecause defendant's evidence failed to meet the threshold requirement of relevance, its exclusion pursuant to [Evidence Code] section 352 did not implicate any due process concerns." (*Id.* at p. 685.)

C. Motion for New Trial

Defendant contends the trial court abused its discretion in denying his motion for a new trial based on newly discovered evidence under section 1181, subdivision (8).⁵ The

⁵ Section 1181, subdivision 8 provides in relevant part:

proffered evidence was a declaration of co-defendant, who the jury had just acquitted on all charges. Co-defendant declared that a verbal altercation began after Bobby refused to leave the room. Bobby stated, in a threatening manner, that if he left, he was coming back. Bobby clarified to defendant that he meant that he was going to “pop you cracker.” “A physical altercation then broke out between [Bobby] and me. [Bobby] swung at me and I raised my arm to block. I then punched [Bobby], and both of us were swinging.” Defendant and Bobby also exchanged punches: “the two of them were equally engaged in swinging at each other.” Co-defendant did not see a knife in either defendant’s or Bobby’s hands during their exchange, but declared, “I know [Bobby] had some type of weapon because I received a large laceration to my arm from blocking the first swing by [Bobby].”

In support of the motion, defense counsel submitted a declaration from a juror stating that, if she had heard the evidence in co-defendant’s declaration, she would not have voted to find defendant guilty.

The trial court denied defendant’s motion. The court began by explaining that the evidence should not be considered newly discovered evidence, but rather newly available evidence, because everyone knew co-defendant was an eyewitness and he had been unavailable because he chose not to testify. Regardless, the court found that the evidence was cumulative of what defendant had said at trial. The court also found the juror

“When a verdict has been rendered . . . against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

“[¶] . . . [¶]

“8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.”

declaration inadmissible under Evidence Code section 1150.⁶ “[B]ut I respect that . . . that was [her] position. [¶] The problem is that her opinion is nothing other than speculation. I mean, she hasn’t heard [co-defendant] testify, she hasn’t heard cross-examination on [co-defendant], she hasn’t gone through the process of evaluating [co-defendant’s] demeanor on the stand and whether there are inconsistencies. Any of the things that we expect are critical to a determination of the accuracy of information. [¶] So, while she can say that, gee, this would have been helpful information, to say it would have changed her opinion is simply nothing other than, perhaps, her wish but speculative in nature.”

“ ‘ “The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” ’ [Citations.] ‘ “[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background.” ’ [Citation.] [¶] In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ‘ “1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.” ’ ” (*People v. Delgado, supra*, 5 Cal.4th at p. 328.) “In addition, ‘the trial court may consider the credibility as well as materiality of the evidence in its

⁶ Evidence Code section 1150, subdivision (a) provides: “Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.”

determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.’ ” (*Id.* at p. 329.)

Assuming the evidence qualified as newly discovered evidence under California law, we cannot say, from the record before us, that the trial court abused its discretion in denying the motion for new trial based on this evidence.

Defendant concedes that “[g]enerally speaking, evidence that is merely cumulative of that already presented will not justify granting a new trial.” (6 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) Criminal Judgment, § 106, p. 148.) However, he asserts his co-defendant’s corroboration was not merely cumulative because the prosecution argued during closing arguments that defendant’s version of events was not corroborated by the evidence or any witnesses. It is not an abuse of discretion for the trial court to conclude that this was not a sufficient ground for granting a new trial. (*People v. Granillo* (1934) 140 Cal.App. 707, 719 [“[I]t has been held that newly discovered evidence which, if admitted, would be corroborative merely of the testimony of the defendant, tending to impeach the prosecuting witness, was not of itself sufficient ground for granting a new trial”]; *People v. Vejar* (1928) 93 Cal.App. 259, 260-261.) Moreover, as corroboration of defendant’s self-defense claim, the declaration had limited value. Co-defendant only stated that he assumed that Bobby had “some type of weapon” based on the cut to his arm. The jury was already aware of this cut and defendant’s testimony regarding its origin. Defendant admitted he stabbed Bobby with a knife and testified that Bobby had a knife. Defendant explained that Bobby had charged him, and that he kept stabbing Bobby because Bobby kept attacking him. In comparison, co-defendant described only a mutual fistfight and declared that he did not see either Bobby or defendant with a knife during their exchange. The trial court could have reasonably concluded this newly discovered evidence from co-defendant was not likely to affect the outcome.

Defendant relies on *People v. Soojian* (2010) 190 Cal.App.4th 491, which held that a defendant “has met his burden of establishing that a different result is probable on

retrial of the case if he has established that it is probable that at least one juror would have voted to find him not guilty had the new evidence been presented.” (*Id.* at p. 521.) Regardless of the admissibility of the juror’s declaration,⁷ “the test is not a subjective one[,] whether a particular trier of fact would be persuaded by the new evidence to reach a different conclusion, but rather is an objective one based on all the evidence, old and new, whether any second trier of fact, court or jury, would probably reach a different result.” (*People v. Huskins* (1966) 245 Cal.App.2d 859, 862; see *People v. Bishop* (1993) 14 Cal.App.4th 203, 212.) We agree with the trial court that, under these circumstances, the juror’s declaration was speculative because cross-examination of co-defendant and his demeanor on the witness stand would have been critical. The jury had already heard a stronger version of his story from defendant himself and had chosen not to believe it. It is speculative to assume any juror would have believed co-defendant in a new trial: “ ‘It is not uncommon, after trial, for one not charged with a crime to attempt to absolve his fellow confederate who has been convicted. [Citation.] The trial court was not bound to accept the statement of [the witness] as true. [Citation.] It was entitled to regard it with distrust and disfavor.’ ” (*People v. Shoals* (1992) 8 Cal.App.4th 475, 488.) The court did not abuse its discretion in denying defendant’s motion for a new trial.

D. Senate Bill No. 1393

At the time of sentencing, the imposition of the section 667, subdivision (a)(1), five-year prior serious felony enhancement was mandatory, and the court had no discretion to strike it. (Former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a

⁷ Evidence Code section 1150, subdivision (a) applies “[u]pon an inquiry as to the validity of a verdict.” Since defendant was seeking a new trial based on newly discovered evidence, and not on the grounds of juror misconduct, the section does not appear to have any application to the issue before the trial court. Nonetheless, the evidence was not dispositive.

sentence under Section 667”].) On September 30, 2018, the Governor signed Senate Bill No. 1393 (2017-2018 Reg. Sess.), which amended this rule. Effective January 1, 2019, a court may exercise its discretion under section 1385 to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) The People concede this change applies retroactively to these proceedings, and we accept the People’s concession on this point. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.)

The People nonetheless contend remand is not required because the trial court clearly indicated it would not have dismissed the five-year prior serious felony enhancement even if it had discretion to do so. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 [reconsideration of sentence not required if “the sentencing court clearly indicated that it would not, in any event, have exercised its discretion”].) We disagree. The record is silent as to the trial court’s thoughts regarding the section 667, subdivision (a)(1) enhancement. The court’s broad statement that “it would not be in the interest of justice to strike the 2005 conviction as an enhancement” was made in a different context—setting aside a prior strike—that would have resulted in a more substantial reduction in defendant’s overall sentence. While it is potentially suggestive that the trial court declined to strike defendant’s prior strike conviction and prior prison term enhancements, the record does not clearly indicate that the court would not, in any event, have exercised its discretion to strike or dismiss the section 667, subdivision (a)(1) enhancement had it been possible to do so at the time of the original sentencing.

Moreover, “ ‘[d]efendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.]” (*People v. Gutierrez*

(2014) 58 Cal.4th 1354, 1391 [remand appropriate because the record did not clearly indicate the court would have imposed the same sentence had it been aware of the full scope of its discretion after a change in the law].) Because the trial court sentenced defendant without the benefit of the discretion to strike the five-year prior serious felony enhancement under section 667, subdivision (a)(1), remand for resentencing is appropriate.

E. Custody Credits

Defendant argues he is entitled to 729 days of custody credits, and not the 727 reflected in the abstract of judgment and minute orders. The People concede the issue on the basis that the trial court's oral pronouncement was an award of 729 days of custody credits. Where the abstract of judgment or clerk's minutes differ from the court's oral pronouncements, the oral pronouncement of judgment controls. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070; *People v. Zackery* (2007) 147 Cal.App.4th 380, 388.) Because we are remanding for resentencing, the oral pronouncement, minutes and abstract of judgment can be conformed at that time.

III. DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the cause is remanded to the trial court for the purpose of allowing the court to exercise its discretion whether to strike or dismiss the enhancement under section 667, subdivision (a)(1). Upon doing so, the court shall resentence defendant accordingly. At resentencing, the oral pronouncement, minutes and abstract of judgment should reflect 729 days of custody credits.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

HULL, J.